

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 239 of 1981

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

BELIM IBRAHIM MOHMAD

Versus

BAI JINIBAI ABUBAKAR

Appearance:

MR DU SHAH for Appellant

MR AJ MEMON for Respondent

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 17/06/98

ORAL JUDGEMENT

1. This second appeal has been filed by original defendant before this Court. The Civil Judge (J.D.), Rajula on 5-2-1979 decreed the suit of the plaintiff and declaration has been given that the wall situated between House No.116/4, 116/5 and 116/6 which goes from north to south is belonging to the plaintiff and defendant has no right to break the wall in dispute. It was further declared that the defendant has no right to pass through

the place of wall situated between house No.116/4, 116/5 and 116/6 of the plaintiff. Against this judgment and decree of the trial court, the defendant preferred first appeal before the Court of District Judge, Amreli which came to be decided by the Assistant Judge, Amreli under its judgment and decree dated 7-3-1981 and the same was dismissed. The operative part of the judgment of the first appellate court, reads as under:

18. Appeal is hereby dismissed. It is hereby declared that the disputed wall running North-West joining the house No.116/4 and house No.116/6 belongs to the plaintiff and it is further declared that the defendant has no right of way towards East through open space between house No.116/4 and 116/6 and that the defendant has no right to infringe the right of privacy of the plaintiff and that the defendant has no right to demolish the disputed wall and that the defendant is hereby permanently restrained from enjoying the right of way towards East and from demolishing the disputed wall. Appellant to pay the costs of this appeal to the respondent and bear his own costs.

Hence, this second appeal before this Court.

2. In this appeal, following substantial question of law has been framed for consideration:

"Whether the learned Judge has erred in law in granting the declaration and injunction to the respondent regarding the ownership of the open space between house No.116/4 and 116/6 in absence of document of title or any reliable evidence ; and in denying the claim of the appellant regarding the right of way ?

3. Learned counsel for the appellant contended that the plaintiff has not produced any evidence of title or any other reliable evidence in respect of the open space between the house no.116/4 and 116/6.

4. On the other hand, the counsel for the respondent contended that there is a concurrent finding of fact of both the Courts below that the land in between the aforesaid houses belongs to the plaintiff-respondent and as such this Court may not interfere in the matter.

5. I have considered the rival contentions made by the learned counsel for the parties and gone through the

judgment of both the Courts below.

6. Both the courts below have concurrently held that the land in dispute i.e. open space of land in between the house no.116/4 and 116/6 belongs to the plaintiff. To reach to this finding of fact, learned first appellate court has taken into consideration the evidence of both the parties. Learned trial court has also made reference to the evidence of the defendant. From the judgment of the trial court, I find that the defendant has tried to make out a case that the land in between the house no.116/4 and 116/6 belongs to the Panchayat i.e. it is a Panchayat road but the defendant himself has admitted in his cross-examination that as soon as the limit of his land situated on east side of his house ends, the limit of house of the plaintiff begins. In the written statement, Ex.16 it was not the case of the defendant that the open space of the land in dispute belongs to Panchayat or it is a Panchayat road. In the absence of these pleadings and further in view of the admission of the defendant that as soon as the limit of his land situated on east side of his house ends, the limit of house of the plaintiff begins, both the courts have not committed any illegality in accepting the case of the plaintiff. Learned counsel for the appellant has produced for the perusal of the Court, the map mark 3/1 though he contended that this map has not been exhibited, he has further submitted that he has no objection in case it is considered for the appreciation of the case. I find from the judgment of the trial court that this document - map, mark 3/1, has been considered by the trial court without there being any objection taken by the defendant-appellant. Similarly, this objection has also not been raised by the defendant-appellant before the first appellate court. From this map, I find that after the limit of the house of the defendant towards the east side ends, limit of the house of the plaintiff begins and further when the defendant has failed to prove that the land in dispute belongs to Panchayat, the Courts below have rightly come to the conclusion that this land belongs to the plaintiff.

7. The net result of the aforesaid discussion is that it is not correct to say on the part of the appellant that there is no evidence produced of the title of the open space of land in between the house No.116/4 and 116/6 in favour of the plaintiff. No question of law much less a substantial question of law arise in this appeal.

8. In the result, this second appeal fails and the

same is dismissed. Interim relief, if any, granted by
this Court stands vacated. No order as to costs.